

Blue Book

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER**

BACKGROUND

Notice was given on May 26, 1988, that if a hearing was not requested in a timely manner, the Application for Change of Appropriation Water Right No. G211081-76LJ would be denied.

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on August 25, 1988, in Kalispell, Montana. Dennis Rasmussen was present and represented by his attorney, James C. Bartlett. Present for the DNRC was Hearings Examiner Laurence Siroky and DNRC Legal Counsel Tim D. Hall. Also present was DNRC Kalispell Field Office Manager Chuck Brasen.

WHEREFORE, based on the record herein, the Department makes the following:

FINDINGS OF FACT

1. Dennis and Beverly Rasmussen applied on May 2, 1986, for change of water right.

2. By this application, the Rasmussens seek to change the use and place of use of Statement of Claim of Existing Water Right No. 76 LJ-W-211081.

3. Statement of Claim of Existing Water Right No. 76LJ-W-211081 claims 1 cfs up to 200 acre-feet per year of Big Lost Creek, with a claimed priority date of May 13, 1963, diverted in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, Township 29 North, Range 22 West (Flathead County) between May 1 and September 30 each year, for sprinkler irrigation of 80 acres located in Section 29, Township 29 North, Range 22 West (Flathead County). Forty of those acres are located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, Township 29 North, Range 22 West and 40 are located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 29 North, Range 22 West.

On May 21, 1986, the Statement of Claim for Existing Water Right No. 76LJ-W-211081 was amended to add: 1) a point of diversion at the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 29 North,

Range 22 West; 2) an additional place of use amounting to an additional 20 acres located at the $W\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 29 North, Range 22 West; and 3) an additional volume of 50 acre-feet of water per year.

4. By the Application, Rasmussens request that the Department authorize changes in the above said rights so that 37 gpm up to 25 acre-feet per annum of water can be diverted to storage for use as a fish and wildlife pond at the $NW\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 29 North, Range 22 West (Flathead County). The application seeks to change a portion of the above described claimed water right with 8 acres to be removed from irrigation in the $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$ and 2 acres to be removed from the $W\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 29 North, Range 22 West.

5. The pertinent facts of the Application were published in the Daily InterLake as newspaper of general circulation in the area of the source on July 23 and 30, 1986.

6. The Application received two objections as follows:

a.) Melvin and Margaret Muender wanted assurances that enough water would be left in Big Lost Creek to water their livestock year round.

b.) Frances Keller also objected on the basis that he used Big Lost Creek for watering cattle and horses.

7. The Rasmussens' Statement of Claim of Existing Water Right No. 76-LJ-211081 was received by the Department on September 4, 1984, more than two years beyond the April 30, 1982, deadline set by the Montana Supreme Court for filing claims

of existing water rights. Additionally, the amendment to Statement of Claim of Existing Water Right No. 76LJ-W-211081 filed with the DNRC on May 20, 1986, was filed beyond the Montana Supreme Court's filing deadline. As such, both claims are late claims.

8. At the hearing in this matter, Mr. Rasmussen did not deny that the claims were filed late; he testified that he just forgot to file them on time.

9. Mr. Rasmussen testified that he thought a claim filed two years late should not take away his water right.

10. Mr. Rasmussen presented no evidence indicating that he did not receive notice that he was required to file his statement of claim of existing water right by April 30, 1982.

11. At the hearing, there was some testimony by Mrs. Rasmussen in regard to 20 acres of land and water rights that he sold to a Mrs. Larsen (whom he claimed filed a Statement of Claim of Existing Water Rights) which land and water rights were subsequently transferred back to him. Mr. Rasmussen testified, however, that he did not intend to change any of that water right, but that he only sought to change part of his water right as found in Statement of Claim of Existing Water Right No. 76LJ-W-211081. Thus, it is not necessary to consider that claimed water right. Anyway, the state water right records reveal no statements of claim on Basin 76LJ were ever filed on any parcels by a Mrs. Larsen. But most important of all, the Application in this change proceeding is clear on its face that the change is

based on Statement of Claim of Existing Right No. 76LJ-W-211081 and it was advertised for public notice as such. Any change based on a different water right would have to be considered in another change proceeding after requisite notice.

CONCLUSIONS OF LAW

1. Mont. Code Ann. §85-2-402 (1987) provides that "[a]n appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department...."

2. The Department has jurisdiction over the subject matter and the parties involved in this proceeding.

3. The Department gave proper notice of the hearing, and all the relevant substantive and procedural requirements having been fulfilled, the matter is presently before the Hearings Examiner.

4. Mont. Code Ann. §85-2-402 (1987) directs that the Department shall approve a change in appropriation water right if the appropriator proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.
- (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.
- (c) The proposed use of water is a beneficial use.

5. Mont. Code Ann. §85-2-226 (1987), however, mandates, "[t]he failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of

abandonment of that right."

6. Mont. Code Ann. §85-2-221 (1987) requires:

(1) A person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-212, shall file with the Department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

7. By order dated December 7, 1981, the Montana Supreme Court changed its earlier January 1, 1982, deadline for filing claims by extending "[t]he final date for filing statements of claims to existing rights to the use of water in this state arising prior to July 1, 1973 ... to Friday, April 30, 1982 at 5:00 o'clock p.m."

8. Dennis and Beverly Rasmussen's Statement of Claim of Existing Water Right No. 76LJ-W-211081 and the amendment thereto were filed beyond the April 30, 1982, deadline, and are therefore conclusively presumed to be abandoned.

9. Noncompliance with Mont. Code Ann. §85-2-226 (1987) effectuates a forfeiture. See United States v. Locke, 471 U.S. 84 (1985). No actual intent to abandon is required. Instead, non-compliance with the law is all that is required for the forfeiture to take place.

10. The constitutionality of Mont. Code Ann. §85-2-226 (1987) was challenged and upheld in Simmons v. State, Cause No. DV-83-474 (Flathead County District Court), in a January 9, 1985, opinion and judgment from which no appeal was taken. (The case was presided over by the Water Judge for the Clark Fork River Basin Division).

11. By not timely filing their Statement of Claim of Existing Water Right No. 76LJ-W-211081, the Rasmusseps have forfeited their claimed water rights and consequently have no water right which can be changed.

12. Attorney James Bartlett stated at the hearing that he understood the DNRC has been instructed to accept late claims until a decision on late claims is rendered by the Montana Supreme Court. Mr. Bartlett wants the DNRC to approve the change pending a decision on late claims by the Supreme Court, and he said the Rasmussens would then abide by any future Supreme Court decisions on late claims. The DNRC, however, in view of the Simmons case sustaining the constitutionality of Mont. Code Ann. §85-2-226 (1987), can at this time constitutionally deny the administrative change. If, from an appeal of this case, or in the adjudication proceedings, the Rasmussens have their late water claim sustained, the DNRC at that time can decide the merits of the proposed change. Therefore, the DNRC under the undisputed facts of this case holds that for the purpose of this change proceeding, Statement of Claim of Existing Water Right No. 76LJ-W-211081 is, by operation of law, forfeited, and therefore is not legally capable of being changed.

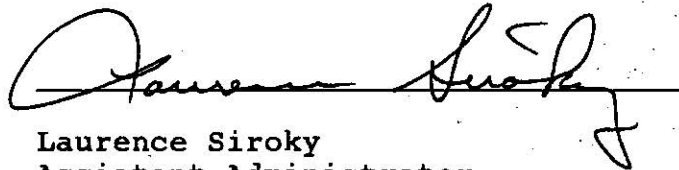
FINAL ORDER

Application for Change of Appropriation Water Right of Statement of Claim of Existing Water Right No. LJ-W-211801 is hereby DENIED.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 3rd day of November, 1988.



Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINAL ORDER was duly served by mail upon all parties of record at their address or addresses this 3rd day of November, 1988, as follows:

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